



## I

### Facts and Travel

Robert was born on December 2, 1969 to Anne Gregory (Anne) and Richard B. Southworth, now deceased. In 1976, following a lengthy separation, Robert's parents divorced. Incidental to the divorce, Anne and Richard executed the Agreement that gives rise to this action. (Joint Ex. 5) The Agreement provides generally for the division of marital property, payment of outstanding obligations, and custody of Robert. Of particular importance to the case at bar is the following provision:

“Husband agrees that if he shall own at his death any interest in the land and buildings thereon described in the deed of William T. Peckham to Franklin Chester Southworth dated October 9, 1920, recorded in Book 23, at Page 39 of the Records of Deeds in the Town of Little Compton, Rhode Island, he will devise all of said interest to Child if Child survives him. Husband further agrees that if he shall sell said interest or any part of it during his lifetime and the Child is living at the date of sale, Husband will turn over all of the proceeds of the sale to said Child if said Child shall have reached the age of 18.” (Ex. 5 at 5.)

Anne testified that Richard had told her “flatly, [he was] not going to pay child support and [he was] not going to get a job.” (Tr. 23, Mar. 24, 2014.) Therefore, according to Anne's testimony, it was agreed that in exchange for not paying child support, Richard would convey his interest in his land as described above. Id. at 21.

The Agreement also provided that Anne was to have custody of Robert, while Richard was to have Robert “at all reasonable times and places which shall include reasonable weekend visits, vacation visits, and holiday visits as shall be mutually agreed upon between the Husband and the Wife.” (Ex. 5 at 6.) Additionally, Richard was to “bear all costs of Child's transportation incurred in connection with such visits.” Id. at 7. Anne testified that as best as she could recollect, from the time Anne and Richard separated until the divorce was finalized in

1976, Robert spent every other weekend with his father. (Tr. 3.) Anne testified that when the Agreement was signed in May of 1976, she had a post-doctoral program arranged in Ohio. Id. at 4. Anne stated: “when [the Agreement] was signed, everybody knew that I was going out to Ohio and that Robert was going with me.” Id. She further testified that Richard knew of her plans to move. Id. at 6. Anne and Robert were already living in Ohio by the time the divorce was finalized. Id. at 5.

Anne testified that while living in Ohio, she would send Robert to visit with his father and Anne’s parents, who lived in Massachusetts, over school vacations, Thanksgiving and Christmas breaks, spring breaks, and summer vacations. Id. at 5. Robert also testified that he remembers visiting with his father in the summertime and holidays. Id. at 40. Once Anne’s post-doctorate program in Ohio was over, she and Robert moved to Michigan so Anne could complete a second post-doctorate program. Id. at 6. Anne recalls that not only did Richard know she was moving to Michigan, but that she gave Richard the choice of having Robert move to Michigan with her or move back to Little Compton to be with his father. Id. Richard instructed her to take Robert to Michigan. Id. Anne and Robert both testified that Robert continued to visit the east coast from Michigan in the same manner he had visited from Ohio. Id. at 40-41. William’s testimony verified Anne and Robert’s memories of visitation: he testified that Robert “would come and spend at least several weeks every summer, and he was also there sometimes at other times, I think there were school vacations and things like that.” (William’s Dep. at 17.)<sup>1</sup> Despite the explicit provision in the Agreement that Richard would bear the costs of travel, Anne testified that she paid all of Robert’s transportation costs. (Tr. 8.)

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<sup>1</sup> William’s testimony was provided by way of deposition.

In 1986, when Robert was sixteen, he and his mother moved to Ireland. Id. at 2, 9, 41. Before making this move, however, Anne recalled asking Richard if he would like her to make arrangements for Robert to stay in Little Compton with him. Id. at 9. Anne's testimony was that Richard responded: "No. Take him with you." Id. Except for approximately a four-month period during which he studied in Budapest, Robert spent the next year in Ireland. Id. at 42-43. Although Robert does not recall receiving a single letter or phone call from his father, he testified that his father always knew where he was prior to the move to Ireland. Id. He further testified that his father knew he was studying in Budapest. Id. at 42. This testimony was corroborated by William: William testified that Richard knew Robert was in Hungary for the summer and that this fact was well-known throughout the family. (William's Dep. at 25.) In the fall of 1987, Robert moved to California to begin college at Cal Tech; his testimony was that his father knew he had enrolled in the school. (Tr. 43.)

At the time of the divorce and the execution of the Agreement, the Little Compton real estate consisted of seventy acres and was owned in equal, undivided shares by Richard, William, their sister, Alice, and their brother, Franklin (collectively the siblings). (William's Dep. at 8-9.) Two houses were located on the land: the "big house" and a smaller farmhouse. Id. at 9. Following Anne and Richard's divorce, Richard moved to Little Compton to live year round. Id. at 9-10. He would live in the big house during the winter then move to the farmhouse in the summer while the big house was rented for a "considerable sum." Id. at 10. The rental income was used for maintenance, taxes, and insurance; Richard also received some of the money for his use in maintaining the property. Id. at 11. Eventually, the four siblings wanted to divide the property into equal shares. Id. However, this proved "a very difficult thing to do, to get four lots that were of equal value because some of the land was much more valuable than the rest of it."

Id. Fortunately for the siblings, the Little Compton Conservation Commission had funds available with which it could buy the development rights and preserve the property. Id.

On June 3, 1988, in the midst of discussions between the siblings and negotiations with the Conservation Commission, Richard sent Anne a handwritten letter. (Joint Ex. 4) The letter informed Anne that the siblings may have an opportunity to sell the development rights to the land in Little Compton, as described above. Concerned that the “sale of development rights could be interpreted as partial sale of [his] share of the property, and so may be relevant to [the Agreement],” Richard proposed a plan that would enable him to sell the development rights while preserving the spirit of the Agreement, and he inquired whether Anne found his proposal satisfactory.<sup>2</sup> Later that month, apparently having received no response from Anne, Richard sent a copy of the letter to Robert with a request that Robert forward it to his mother. Id.

The parties to this litigation agree that Richard sent this letter to both Robert and Anne in June of 1988, however, Anne has no memory of receiving the letter, and Robert has no memory of reading it. (Tr. 29, 62.) At the time he received this letter, Robert was eighteen and had just completed his freshman year at Cal Tech. Id. at 44. Robert testified that he never discussed the 1988 letter with his mother or his father. Id. at 45. Robert further testified that he cannot recall any conversations between him and his mother regarding the Little Compton property; Anne testified that prior to Richard’s death, she had never told Robert about the contents of the Agreement. Id. at 11, 60. Robert has maintained throughout this litigation that the first time he became aware of his interest in the property was after his father’s death.

In 1994, the siblings sold the development rights to the property for \$700,000. (William’s Dep. at 12-13.) They agreed to split the property, and the proceeds from the sale of

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<sup>2</sup> Enclosed with the letter was a copy of the relevant provisions of the Agreement.

the development rights were used to equalize the shares. Id. As a result of the division, Richard owned the big house and the surrounding two and one-half acres.<sup>3</sup> Id. at 12. Notably, William testified that during the subdivision discussions, Richard mentioned to him that he had an agreement with Anne to leave his interest in the property to Robert. Id. at 24.

In 2007, Robert called his father in an effort to reconnect. (Tr. 45.) The two men began to rebuild their relationship through phone calls, and in the summer of 2008, Robert and his partner, Bill, visited Richard in Little Compton. Id. at 46. During this visit, Richard mentioned to Robert that he had made a will and all his property was going to William and Alice's children. Id. at 47. Robert testified that he was disappointed by this news but did not feel it was his place to argue. Id. at 47. Robert testified that during the conversations regarding the will, he was not aware that his father was obligated by the 1976 Agreement to devise his Little Compton property to him. Id. at 48. Richard's will had, in fact, already been drafted and executed approximately four years earlier on August 6, 2004. (Joint Ex. 1.)

Richard passed away in March of 2010. William, as executor of the Estate, petitioned the court to probate the will. Robert received a copy of the petition, but believing it to be a valid will, he did not contest it. (Tr. 51.) Immediately following his father's death in March, Robert and his partner, Bill, traveled to Little Compton to help organize and sort out Richard's affairs. Id. at 49. During the course of this visit, while looking through Richard's filing cabinet, Bill came across a copy of the Agreement. Id. at 68. Seeing the heading "divorce agreement" on the paperwork, Bill determined the paperwork was private and inappropriate for him to read and therefore looked no further. Id.

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<sup>3</sup> This property is now identified as 64B Swamp Road.

Robert and Bill returned to Rhode Island for Richard's memorial service in August of 2010. Id. at 51. They learned at that time that Richard's house was being sold and that a closing was imminent. Id. During that visit, one of Robert's cousins mentioned to Bill her recollection that an agreement existed providing that upon Richard's death his property was supposed to go to Robert. Id. at 54. A closer review of the Agreement, which was located boxed up in Robert's Aunt Alice's house, confirmed the cousin's recollection, and this litigation ensued.

## II

### Analysis

At issue is ownership of the decedent's property in Little Compton (the land or the property). Robert asserts that Richard breached the Agreement, of which Robert is an intended third-party beneficiary, and he seeks a declaratory judgment that he is the rightful owner of the property. The Defendants argue that Robert lost standing to enforce the Agreement as a third-party beneficiary by failing to ratify or otherwise assent to the Agreement. Defendants further argue that Anne breached the Agreement's provisions regarding visitation, rendering it invalid.

The Rhode Island Supreme Court "has long upheld 'the right of a third person to enforce a promise made by one person to another for the benefit of said third person, although the consideration does not move from such third person and although he was not cognizant of the promise when it was made.'" Cathay Cathay, Inc. v. Vindalu, LLC, 962 A.2d 740, 745-46 (R.I. 2009) (quoting Blake v. Atl. Nat'l Bank, 33 R.I. 464, 467, 82 A. 225, 226 (1912).)

In the case at bar, there is no dispute that Richard and Anne entered into a valid contract on May 24, 1976. (Agreed Statement of Facts, ¶ 7.) Neither is there any dispute that Robert was the intended beneficiary of the contract. Thus, Robert has successfully demonstrated the threshold requirements to prevailing on a third-party beneficiary theory. See Cathay Cathay,

Inc., 962 A.2d at 745 (“To prevail on a third-party beneficiary theory, plaintiffs must first show that they are the intended beneficiaries of the lease . . . .”). Defendants argue, however, that the right of a third-party beneficiary to enforce a contract made for his or her benefit is contingent on the third party’s assenting to or ratifying the contract. Curato v. Brain, 715 A.2d 631, 635 (R.I. 1998). The Defendants contend, relying on Curato, that Robert lost his standing to enforce the Agreement by reason of his failure to timely ratify or enforce the Agreement. Id.

Though factually very similar to the case at bar, Curato is of little help to the Defendants. There, the Rhode Island Supreme Court held that although the third-party beneficiary did have actionable rights at one time, her rights had been extinguished because the statute of limitations on the breach of contract claim had run prior to her assenting to or ratifying the contract. Id. at 635 (“As a result the statute of limitations on any potential cause of action resulting from the breach expired ten years after the 1980 conveyance of the property, and the rights that were intended to inure to [Plaintiff third-party beneficiary] pursuant to the agreement were extinguished before they could vest.”).

Here, however, the statute of limitations cannot bar Robert’s claim. The Court finds that Richard breached the Agreement either in 2004, when he executed his will omitting his son and leaving his property to his brother and nephews, or in 2008, when Richard informed Robert that he was omitting Robert from the will.<sup>4</sup> In either case, the statute of limitations will not preclude any breach of contract claim for ten years following the breach. Sec. 9-1-13(a). In light of the Court’s finding that, at the earliest, Richard breached the Agreement in 2004, Robert had until

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<sup>4</sup> The Defendants seem to argue that if Richard breached the Agreement, it was by virtue of his 1988 letter indicating he would be selling the development rights to the property. A thorough reading of this letter satisfies the Court that this letter was not a breach of the Agreement, but was rather an acknowledgment of the Agreement and a good faith effort on Richard’s part to accommodate unforeseen circumstances while adhering to the spirit, if not the letter, of the Agreement, i.e. that his interest in the Little Compton property pass to his son on his demise.



2014 to bring this action. The action was filed in November of 2010, well within the statutory ten year period.

The Court is satisfied that Robert did not forfeit his right to enforce the Agreement. The Court notes that Robert was six years old at the time his parents entered into the Agreement. Persuasive authority instructs that “[a] minor child is presumed to accept a contract made for its benefit, contemporaneously with the making of the contract.” 17B Corpus Juris Secundum § 623 (West Group, 1999) (citing Plunkett v. Atkins, 371 P.2d 727, 732 (Okla. 1962)); see also Waterman v. Morgan, 114 Ind. 237, 16 N.E. 590, 592 (1888) (finding at the time the agreement was executed, the “appellees, for whose benefit the promises were made, were infants. No formal or express acceptance was necessary on their part. The provision . . . was beneficial to them; and therefore an acceptance by them will be presumed as contemporaneous with the promises.”). Restatement (Second) Contracts § 311, comment d—discussing the revocable nature of a duty to a beneficiary with full capacity until the beneficiary assents to the contract—also supports this view. That section states that where a beneficiary lacks capacity, as in the case of an infant, the assumption that a duty is revocable is less justified, and therefore it is “sometimes said that in such a case the infant’s assent is ‘presumed.’” Restatements (Second) Contracts § 311, cmt. d. Thus, Robert may be presumed to have accepted the Agreement and its terms contemporaneously with the making of the Agreement in 1976.

Additionally, the “bringing of suit against the promisor is a sufficient manifestation of assent to preclude discharge.” Id. at cmt. h. Indeed, for a third-party beneficiary to acquire rights under the promise made for his benefit, “[i]t must clearly appear, by suit brought upon the agreement or in some other manner, that the third person knows of the promise in his favor . . . accepts the new agreement, and assents to its terms.” Blake, 33 R.I. at 464, 82 A. at 226

(emphasis added.) Therefore, whether Robert may be presumed to have assented to the contract as a minor—or whether he clearly acceded to it by the bringing of this very suit within the statute of limitations—Robert has clearly manifested his assent to the Agreement and its terms and has not lost his standing to enforce it.

Defendants also argue that Richard was relieved of his obligations under the Agreement by Anne’s conduct. Specifically, the Defendants claim that Anne breached the Agreement by moving away from Rhode Island, violating Richard’s right to visitation with his son, and by failing to encourage and foster Robert’s affection for his father, as required by § III(C) of the Agreement.<sup>5</sup> (Joint Ex. 5.) Richard’s visitation rights, per the Agreement, were to include “reasonable weekend visits, vacation visits, and holiday visits as shall be mutually agreed upon between the Husband and the Wife.” *Id.* at 6. Anne testified that in “May of ’76 when [the Agreement] was signed, everybody knew [she] was going out to Ohio and that Robert was going with [her].” (Tr. 4.) The language of the Agreement itself reveals that the parties contemplated a long distance relationship. *See* Ex. 5 at 7 (“[t]he Husband and Wife shall consult together, by correspondence or telephone, (if a personal conference is impractical) from time to time . . . .”); *Id.* at 9 (“Wife may remove Child from the State of Massachusetts.”). It is clear from the testimony of Anne, Robert, and William that Robert spent summer vacations, holidays, and many school vacations in Little Compton. It should be noted that the evidence before the Court indicates that when Robert did travel to visit his father, Anne paid his travel costs, despite the Agreement’s express mandate that Richard bear all such costs. (Tr. 8; Ex. 5 at 7.) Furthermore, Anne testified that before she moved to Ireland, she asked Richard if he would like Robert to stay with him in Little Compton, but Richard declined. (Tr. 9.)

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<sup>5</sup> That section provides, in pertinent part, that both Anne and Richard would “at all times encourage and foster in the Child respect and affection for both parents.”

Accordingly, while Richard may not have visited with his son precisely in conformity with the schedule in the Agreement, the modified visitation schedule enjoyed by Richard was developed with Richard's tacit, if not express, approval. In fact, the Court notes that the only evidence before it demonstrating that Richard ever complained about or expressed dissatisfaction with the visitation arrangement is his statement in the 1988 letter to Anne that "it would be nice to see and hear more of Robert." Robert was an adult by that point. The Defendants/counterclaimants have not carried their burden of establishing that Anne materially breached her obligations under the Agreement vis-à-vis her ex-husband's visitation rights. See Gorman v. St. Raphael Acad., 853 A.2d 28, 37 (R.I. 2004) ("[T]he burden of proof in a breach of contract action rests with a plaintiff to show that a defendant breached the contract.").

Lastly, Defendants produced no credible evidence demonstrating that Anne failed to encourage and foster Robert's affection for his father. Anne testified that she never spoke negatively about Richard to Robert. (Tr. 9.) Robert testified that he remembered "well the very first time" his mother said anything negative to him about his father. (Tr. 46.) He recalled that in August of 2010, after Richard's memorial ceremony, Anne informed him that at the time she and Richard made the Agreement, Richard had refused to pay any child support. Id. The Court is satisfied that in regard to the subjects of custody and visitation, Anne substantially complied with the terms of the Agreement and the expectations of the parties as expressed therein. To the extent that the practice of the parties in respect to Robert's visitation with his father varied from the letter of the Agreement, it is clear that it was done with the acquiescence of both parties. See 17A Am. Jur. 2d Contracts § 507 ("[P]arties to an existing contract may, by mutual assent, modify it . . .").

Robert now seeks specific performance of his father's agreement to devise his interest in the Little Compton property to him. Specific performance "rests within the sound discretion of the trial justice." DePetrillo v. Lepore, 871 A.2d 907, 909 (R.I. 2005). For a court to award specific performance, the contract "must be sufficiently certain and definite in its terms to leave no reasonable doubt as to what the parties intended, and no reasonable doubt of the specific thing equity is called upon to have performed." Id.

Here, the terms of the Agreement are perfectly clear, as is the breach of that Agreement by Richard. Accordingly, the appropriate remedy is that the terms of the Agreement be enforced, and that title pass to Robert as if he had been the sole devisee of the property under the terms of his father's will. See Emery v. Darling, 50 Ohio St. 160, 165, 33 N.E. 715, 716 (1893) ("A promise to make a will in favor of a party, supported by a sufficient consideration, and in due form of law, is a valid contract, and, if not made, may be specifically enforced against the heirs of the promisor.").

Also at issue is with whom lies the responsibility for any estate taxes due by reason of the transfer of the Little Compton property to Robert. Pursuant to the instructions in the will, the Executor of Richard's Estate, William, shall "pay out of [the] residuary estate . . . any and all estate . . . taxes . . . which may be levied or assessed in respect to any property passing under this [] Last Will and Testament." (Joint Ex. 1.) The Defendants posit that if this Court decides that Robert owns the property, the property would pass as a result of the Agreement and not under the will. Therefore, the Defendants argue, Robert is responsible for the estate taxes because the will instructs that the Estate is responsible only for taxes levied against property passing under the will. This Court has found that Richard breached the Agreement by not devising the Little Compton property to Robert. "A basic maxim of equity provides that equity regards as done that

which ought to have been done.” Finkelstein v. Finkelstein, 502 A.2d 350, 354 (R.I. 1985). Because the property should have passed to Robert under Richard’s will, the taxes levied in respect to the transfer of the property to Robert will be paid out of the residuary estate.

Lastly, the Court shall address the counterclaim by William in his capacity as Executor of the Estate. That counterclaim states that the Estate incurred \$8000 in damages as a result of Robert’s alleged negligent or intentional misrepresentation or concealment of a material fact. More specifically, the Estate alleges that Robert knew or should have known that he had an interest in the property but took no action to protect that interest and made no claim to the property during the probate of the will. This inaction, the Estate claims, constituted a misrepresentation or withholding of a material fact, which led the Executor to contract to sell the property. Thus, the argument concludes, Robert is responsible for the expenses incurred by the Estate extricating itself from the agreement to sell.

Success on a negligent misrepresentation claim requires the claimant to prove

“(1) a misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the misrepresentation without knowledge as to its truth or falsity or must make the representation under circumstances in which he ought to have known of its falsity; (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation.” Zarella v. Minnesota Mut. Life Ins. Co., 824 A.2d 1249, 1257 (R.I. 2003).

The Court recognizes that where there is a duty to disclose material facts, concealment of those facts may constitute fraud or misrepresentation. See Home Loan & Inv. Ass’n v. Pattera, 105 R.I. 763, 255 A.2d 165 (1969). “It is well established in Rhode Island that a defendant cannot be held liable under a negligence theory unless the defendant owes a duty of care to the plaintiff and that duty has been breached.” Mallette v. Children’s Friend & Serv., 661 A.2d 67, 70 (R.I.

1995). Equally well established is “[w]hether such a duty exists in a particular factual situation is a question of law for the court’s determination.” Id. In making such a determination, the court is to consider “all relevant factors, including the relationship of the parties, the scope and burden of the obligation to be imposed upon the defendant, public policy considerations and notions of fairness.” Id. Here, the Defendants point to no policy, statute, or circumstances that would create a duty of care running to Robert that would require him to disclose any knowledge he may have had regarding his interest in his father’s property. Id.

Even assuming a duty existed, however, the Estate in this case has failed to prove the essential elements of a misrepresentation cause of action. On a very basic level, the concealment claim is premised on the assumption that Robert, during the relevant period, knew he had an enforceable right to the Little Compton property: this is a premise the Court cannot accept. Robert was only eighteen years old and was immersed in his studies at Cal Tech when he received what he referred to as his father’s “dense” and “legalistic” June 1988 letter. (Tr. 45.) The Court is satisfied that Robert did not have an awareness of the Agreement as a basis for his claim to the Little Compton property until after his father’s memorial service in August of 2010. The evidence before the Court is that once Robert did become aware of the Agreement and its terms, he immediately contacted a lawyer and made his family aware of his newly-discovered interest. Id. at 54-55. Concealment connotes knowledge. See Black’s Law Dictionary, 289 (6th ed. 1990) (defining concealment as: “a withholding of something which one knows . . . .”) Robert cannot be liable for concealing or withholding information that he did not know.

There is also no indication in the record that Robert intended to induce the Executor to sell the property. To the contrary, the evidence demonstrates that Robert did not want the house to be sold. Robert testified that when he and his partner were in Little Compton for his father’s

memorial service, he organized a family conference to “try to convince [the Executor] that the property should not be sold outside the family.” (Tr. 51.) In the absence of any evidence that the Executor’s conduct was induced by Robert’s alleged misrepresentations, the Estate cannot prevail on the misrepresentation claim. See Zarrella, 824 A.2d at 1258 (“[P]laintiff could not have prevailed on the misrepresentation claims because the statement did not induce plaintiff to act on them in the manner that [Defendant] intended.”).

Further, “in order to prevail on a misrepresentation claim, one must prove justifiable reliance on the misrepresentation.” Manchester v. Pereira, 926 A.2d 1005, 1012 (R.I. 2007). Apparent from William’s own testimony is that he was aware that his brother, Richard, had agreed to devise his property to Robert. (William’s Dep. at 24.) That being the case, it is unreasonable for William to suggest that Robert should be faulted for any delay in asserting his rights under the Agreement. See Manchester, 926 A.2d at 1012.

### **III**

#### **Conclusion**

In sum, this Court finds that Richard breached the property settlement Agreement and that his breach is not excused by his ex-wife’s conduct. The Defendants are ordered to execute a conveyance sufficient to transfer title in the Little Compton property owned by Richard at the time of his death to Robert. Failure to do so will result in the appointment of a master at the Defendants’ expense pursuant to § 9-14-26. Further, the Court declares that the Estate is responsible for the estate taxes levied against the property. The Defendant Estate’s counterclaim is dismissed with prejudice. Counsel shall submit the appropriate order for entry.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** Southworth v. Southworth, et al.

**CASE NO:** NC 2010-0654

**COURT:** Newport County Superior Court

**DATE DECISION FILED:** August 5, 2014

**JUSTICE/MAGISTRATE:** Gallo, J.

**ATTORNEYS:**

**For Plaintiff:** Jeremiah C. Lynch, III, Esquire

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